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ABSTRACT

Although common law does not provide reporters with the privilege of withholding confidential sources or information before courts of law, reporters have raised First Amendment arguments for such privilege. In Branzburg v. Hayes (1972), a case consolidating three decisions, the Supreme Court ruled heavily, but not absolutely, against such First Amendment protection for reporters. Because of the inclusion of the idea of conditional privilege and its broad scope, the decision has not provided lower courts with definitive guidance. In cases involving a crime, courts have generally found that when a reporter is a witness or participant in the events for which he or she has been subpoenaed, there will be no privilege. In other criminal cases, courts have been more willing to accept that reporters have a qualified privilege. In 1978, Myron Farber went to jail and his employer, the "New York Times," paid over $285,000 in fines, but Farber did not disclose his confidential files. In response to a great increase in subpoenas since the Farber case, members of the press have devised creative strategies to combat or work around the legal system. All in all, two seemingly contradictory trends have emerged: the concept of a qualified, First Amendment privilege for reporters is emerging, while at the same time the number of subpoenas seeking confidential information is increasing. The complexity of society, the costs of litigation, and the court system itself may explain the current situation. (JL)

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REPORTER'S PRIVILEGE

FREEDOM OF INFORMATION CENTER REPORT NO. 464

This report was written by Peggy Slasman, a master's candidate at the University of Missouri School of Journalism.

The epilogue to the complicated case of Myron A. Farber was written Jan. 18, 1982 — almost six years after the story began. On that day, departing Governor Brendan T. Byrne of New Jersey pardoned the New York **Times** and its reporter, Farber, for criminal contempt in their refusal to surrender Farber's notes in the widely publicized 1978 "Dr. X" murder trial.

Governor Byrne said that court decisions and changes in New Jersey's "shield law" justified the pardons. He said: "Mr. Farber's and the New York **Times**' purpose was not to insult or frustrate the judicial process, but to stand on a noble, if sometimes imperfect, principle." (New York **Times**, 19 Jan. 1982)

The following day, the governor, on his final day in office, returned to the **Times** a $101,000 criminal contempt fine imposed on the newspaper and Farber.

The Farber case encompassed questions of ethics, principles, a reporter's privilege, the First Amendment and the Sixth Amendment.

Arguably, no clear winner prevailed. Did the judicial system win by punishing Farber and the **Times** for both civil and criminal contempt and by refusing to grant Farber the qualified privilege he argued for? Did Farber and the press win? Although Farber spent 40 days in prison, he is now free — and his confidential files remain secret.

To comprehend what happened in the Farber case, and why, it is necessary to understand the concept of a reporter's privilege — where it came from, where it stood at the time of the Farber case, where it stands today.

REPORTERS AND THE COMMON LAW

The Bill of Rights includes both the right of a free press and the right to a just and orderly judicial process. In most situations, the two rights operate harmoniously. When they conflict, however, society must intervene and decide which right will prevail.

In both federal and state proceedings, competent persons may be compelled to testify in courts of law. Testimonial privileges provided to physicians, attorneys, clergymen and spouses are the exception to the rule. Such privileges are granted to allow the concealment of communications between persons holding confidential relationships deemed worthy of protection.

Although common law in the nineteenth century did not recognize a journalist's privilege, confidentiality was seldom challenged in the courts. Reporters used confidential sources regularly with little fear they would be forced to divulge names or information. Throughout the second half of the nineteenth century, journalists argued that such a privilege should be recognized at common law. Their claim was rejected repeatedly.

Near the end of the nineteenth century, the idea was first advanced that a reporter's privilege could be secured through state statutes — known today as shield laws. Maryland passed the first shield law in 1896. But it was not until the 1930s and 1940s that shield laws began to make progress in other states.[2] Twenty-six states now have shield laws, but states courts often have construed them narrowly.

The most pervasive argument advanced in defense of a reporter's privilege is the First Amendment. In recent years, reporters have claimed that freedom of the press goes beyond the mere absence of government intervention in the editorial process and extends to unhindered newsgathering.

The argument for a reporter's constitutionally based privilege was first raised at the state level, but the courts refused to recognize the need for special treatment for the press.[3] The United States Supreme Court denied certiorari in its first three cases dealing with a First Amendment privilege (**Garland v. Torre**, 259 F. 2d 545 (1958); **In re Murphy**, No. 19604 (Super. Ct. Colorado, 1961), noted in **In re Goodfader**, 367 P. 2d 472 (1961); **State v. Buchanan**, 436 P. 2d 729 (1968)).

Summary

Common law in the U.S. does not provide reporters with the privilege of withholding confidential sources or information before courts of law. Many states now have shield laws for reporters, but courts have generally construed them narrowly, and they are often ineffective in granting protection to reporters.

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FROM GARLAND TO BRANZBURG

In 1958, the first ruling on a First Amendment claim to a privilege for reporters was handed down. The case was **Garland v. Torre**. Actress Judy Garland had been described as "overweight" by columnist Marie Torre of the New York **Herald Tribune**. The remark had been attributed to CBS executives. Garland sued CBS and sought the identity of the persons who had made the derogatory statement. She petitioned to depose defendant Torre. Torre was subpoenaed but refused to disclose her source. Circuit Court Judge Potter Stewart ruled that Torre must reveal her source. The test applied by the court demanded:

- relevancy of the information;
- exhaustion of alternative sources, and;
- that the question asked go to "the heart of the plaintiff's claim."

Judge Stewart said that:

> While it is possible that the plaintiff could have learned the identity of the informant by further discovery proceedings directed to CBS, her reasonable efforts in that direction had met with singular lack of success . . . . The information sought was of obvious materiality and relevance.

The **Garland** decision was remarkable because of its clear implication that had the information being withheld not gone to the heart of the plaintiff's claim, it might have been considered privileged.

Other cases between 1958 and 1972 in which reporters adopted the **Torre** First Amendment defense are **In re Goodfader**, 367 P. 2d 472 (1961); **Re Robert L. Taylor**, 193 A. 2d 181 (1963); **State v. Buchanan**, 436 P. 2d 729 (1968); **State v. Knops**, 183 N.W. 2d 93 (1971)).

In 1972 the press finally got what it had been waiting for — an authoritative answer on the question of a reporter's privilege. On July 29, the U.S. Supreme Court handed down its decision in **Branzburg v. Hayes** (408 U.S. 665), saying:

> We perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential but uncertain burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial (408 U.S. at 690-691).

In a 5-4 decision written by Justice White, the court held that requiring reporters to appear and testify before state or federal grand juries did not abridge the First Amendment.

THE BRANZBURG DECISION

In 1972, three separate cases dealing with a reporter's privilege came up for review in the Supreme Court. The court consolidated them into one — **Branzburg v. Hayes**.

Paul Branzburg was a reporter for the Louisville **Courier-Journal**. He wrote a story about his observations of two people synthesizing hashish from marijuana. In return for granting an interview, Branzburg had promised the pair that he would not reveal their identities.

In response to a subpoena, Branzburg appeared before a Kentucky grand jury. He refused to reveal the persons' identities and claimed a privilege under the First Amendment and Kentucky law. After being ordered to answer the questions, he unsuccessfully sought writs of prohibition and mandamus from the Kentucky Court of Appeals. The Kentucky Supreme Court, in a split decision, held that the privilege did not apply when a reporter had witnessed a crime (**Branzburg v. Pound**, 461 S.W. 2d 345 (1971)). Branzburg appealed.

Caldwell v. United States, involved a New York **Times** reporter, Earl Caldwell, who had been assigned to cover the activities of the Black Panthers on the West Coast. He succeeded in gaining the confidence of certain members of the Panthers and wrote a series of articles about them. On Feb. 2, 1970, he was subpoenaed to appear before a grand jury investigating the Panthers.

After Caldwell and the New York **Times** objected to the scope of the subpoena, the government withdrew it and substituted a second one that required Caldwell to appear before the grand jury and testify about his conversations with the Panthers. Caldwell and the **Times** moved to quash the subpoena and sought a protective order allowing him to shield the identity of his sources.

The district court granted Caldwell's motion for the protective order, but ruled that Caldwell had to appear before the grand jury. Caldwell declined to appear and was held in contempt.

Caldwell appealed the contempt decision to the U.S. Court of Appeals for the Ninth Circuit, and won. The appeals court held that there was no requirement for Caldwell to appear before the grand jury if there was no "compelling need" for such an appearance (**Caldwell v. U.S.**, 434 F. 2d 1081 (1970)). The government appealed to the U.S. Supreme Court, where the **Branzburg** and **Caldwell** cases were consolidated with **In re Pappas**.

Paul Pappas, a newsman-photographer for a Providence, R.I., television station, had been sent to New Bedford, Mass., to report on civil disorders. He gained permission to enter the Black Panthers' headquarters on the condition he not disclose anything he saw or heard inside, except an expected police raid. There was no raid and no story.

Two months later, Pappas was subpoenaed to testify about his three-hour stay at Panther headquarters. Pappas claimed a First Amendment privilege and refused to reveal what he had seen inside. The trial judge denied his motion to quash the subpoena, and the Massachusetts Supreme Court affirmed. (**In re Pappas**, 266 N.E. 2d 297 (1970))

All three journalists argued a position similar to that raised by Torre. They said that in the course of newsgathering it is often necessary for a reporter to promise either not to identify his sources or not to reveal in print everything he knows about a subject. If a reporter is compelled to reveal such information to a grand jury, confidential sources will be deterred from furnishing further information and the free flow of news protected by the First Amendment will be

diminished.

The Supreme Court affirmed **Branzburg** and **Pappas** and reversed **Caldwell**. Justice White wrote the opinion for the majority, in which Chief Justice Burger and Justices Blackmun and Rehnquist joined. Justice Powell filed a concurring opinion which has been suggested is closer to the views of the dissenting justices. Two dissenting opinions were written; one by Justice Douglas, who advocated an absolute privilege for reporters; the other by Justice Stewart, in which Justices Brennan and Marshall joined, asserted a qualified protection for reporters.

Although the court declined to create a testimonial privilege for newsmen, Justice White did allow one small victory for the press. He conceded that the gathering of news was entitled to "some" First Amendment protection, that "without some protection for seeking out the news, freedom of the press could be eviscerated." That protection, though, was limited: "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."

The court emphasized that its ruling involved "no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." The court explained that:

> . . . the use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

The court said there was no evidence that sources would disappear if reporters were compelled to testify. The court also noted that Congress and the states are free to determine whether a statutory privilege is needed for reporters.

The fifth, and deciding, vote in **Branzburg** belonged to Justice Powell who, in a brief concurring opinion, emphasized what he saw as the "limited nature of the Court's holding." Justice Powell urged a balancing approach to the issue. He echoed Justice White's promise that harassment of the press would not be tolerated.

The dissenting opinions in **Branzburg** are important because of the confusion that has evolved as lower courts interpret the case. The dissent written by Justice Stewart and endorsed by Justices Brennan and Marshall urged recognition of a conditional privilege for reporters. Such a privilege would entail shifting the burden of proof away from the journalist attempting to convince a court that he should be granted a testimonial privilege and onto the government to demonstrate why the reporter should be required to testify.

Justice Stewart elaborated a three-pronged test that must be met to satisfy the burden of proof:

- show that there is probable cause to believe that the reporter has information that is clearly relevant to a specific probable violation of law;
- demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and
- demonstrate a compelling and overriding interest in the information.

Justice Stewart based his dissent on three assumptions: reporters need informants to gather news; confidentiality is essential to dealing with informants; and the unbridled use of subpoenas will deter sources from providing information.

Justice Douglas focused his dissent on the **Caldwell** case. He said reporters have an absolute First Amendment right to refuse to appear or testify before a grand jury. He said that unless a reporter has an absolute privilege, he or she "will be the victim of governmental intrigue or aggression."

The lower courts now had a Supreme Court ruling on which to base decisions dealing with a reporter's privilege. But an examination of the cases following **Branzburg** shows that the broad scope of the 1972 decision did not provide the definitive guidance sought by the lower courts.

THE POST-BRANZBURG ERA: REPORTER AS WITNESS TO A CRIME

Although **Branzburg** dealt with a grand jury investigation, it has been used as precedent for decisions involving general civil cases, including libel, as well as criminal cases. This report will concentrate on cases in which reporters have witnessed a crime or had information about a crime or names of crime-relevant informants which the reporters refused to disclose.

The first of the post-**Branzburg** cases was **Bursey v. United States** (466 F. 2d 1059 (1972)), which was handed down from the Ninth Circuit Court of Appeals one day after the **Branzburg** decision. **Bursey** involved two reporters for a Black Panther newspaper who were subpoenaed by a grand jury to answer questions about the newspaper, meetings of the Panthers and a speech by a Panther member threatening President Nixon. The reporters answered some questions, including whether they had information about a plot to kill the president. They refused to answer questions about the management of the newspaper.

On appeal, the Ninth Circuit Court required that the reporters answer 17 of the 56 questions they had refused to answer. Most of the 17 questions addressed the presence of firearms and explosives at the Black Panther meetings and the discussion of threats and possible violence.

After the **Branzburg** opinion was handed down, the government moved for a rehearing, arguing that the **Bursey** holding was inconsistent with the new precedent. The court denied the motion, noting that **Bursey**, unlike **Branzburg**, did not involve newsgathering. The court relied on Justice Powell's concurring opinion in **Branzburg** and applied a balancing test.

Another case soon after the **Branzburg** decision dealt with David Lightman, a reporter for the Baltimore **Sun**. He had written a story based on his observation of marijuana use in an Ocean City, Md., pipe store. Lightman argued that the Maryland shield law protected him from disclosing to a state grand jury the name of the person using marijuana.

The state court disagreed. In an opinion later affirmed by the Maryland Court of Appeals, the court interpreted the word "source" to exclude material taken from the story; thus it said the information was not protected by Maryland statute. (**Lightman v. State**, 294 A. 2d 149 (1972)).

A third post-**Branzburg** case involving the witnessing of a crime by a reporter is **People v. Dan** (41 App. Div. 2d 687

N.Y. (1973)). The case concerned two television reporters who were let into Attica Prison during the 1972 riots. They witnessed some of the killings that occurred when law enforcement officers entered the prison.

The reporters were subpoenaed to appear before a grand jury in upstate New York to testify about what they had seen. They argued that under the state shield law they had a privilege not to testify. The appellate division held that the statute protected only the sources and not reporters who had witnessed crimes. The court ruled there is no constitutional privilege and declined to apply the balancing test advocated in Justice Powell's concurring **Branzburg** opinion.

All three cases involved the witnessing of a crime. Courts have generally found that when a reporter is a witness to or participant in the events for which he or she has been subpoenaed, there will be no privilege.[4]

POST-BRANZBURG ERA: REPORTERS PROTECTING SOURCES

In other cases involving subpoenas to testify in criminal cases, courts have been more willing to accept that reporters have a qualified privilege.

The first of these cases is **State v. St. Peter** (315 A. 2d 254 (1974)). John Gladding, a reporter for a Burlington, Vt., television station, had been informed in advance of a drug raid by state police. He covered the raid and reported on it. An indictment was handed down; Gladding was subpoenaed to testify. He testified about what he had seen, but refused to disclose sources.

The trial court demanded that Gladding respond, upon penalty of contempt. Gladding refused and appealed to the Vermont Supreme Court. The state's high court interpreted **Branzburg** as requiring a balancing test and said that the questions asked of the reporter did not meet the test.

In another 1974 case, the Virginia Supreme Court used **State v. St. Peter** to uphold its ruling in **Brown v. Commonwealth** (204 S.E. 2d 429 (1974)). Helaine Patterson, a reporter for the **Free Lance Star**, wrote about a man who had been shot and killed. Her story quoted a source in the Stafford County, Va., sheriff's office. Patterson was subpoenaed to testify. She authenticated her account of the story, but refused to disclose her source. The trial court upheld her refusal and the Virginia Supreme Court affirmed the opinion.

The high court said there was no evidence that either the statements made at the trial or the prior statements were material to proof of the crime, proof of Brown's defense or reduction of the classification or penalty of the crime charged. Thus, the identity of the source was irrelevant.

An unusual case in the early 1970s was that of William Farr, a reporter for the Los Angeles **Herald Examiner**. In 1970, Farr published an alleged confession during the Charles Manson murder trial. The reporter said that at least two of the six attorneys in the case supplied him with information about the confession. The attorneys had been sworn to confidentiality by the court. When subpoenaed to disclose his courtroom sources, Farr refused, relying on California's shield. But Farr had left the newspaper and gone to work for the district attorney when the proceedings began.

The state courts ruled that the shield law did not apply to former reporters. Farr joined the staff of the Los Angeles **Times** and spent 46 days in jail for his refusal to name his sources. It was the longest incarceration of a reporter for protecting news sources. Farr was ordered released by the California Court of Appeals when it determined that his refusal to testify was based on principle and that prolonging the penalty would be punitive rather than coercive.[5]

In 1978, three subpoenas requiring reporters to testify in criminal trials made it a notable year in the development of press privilege.

State v. Sandstrom (581 P. 2d 812 (1978)) involved Joseph Pennington, a reporter for KAKE-TV of Wichita, Kan. Pennington was sent to Topeka to check on the murder of executive Thad Sandstrom. Milda Sandstrom, the victim's wife, was indicted for murder. Pennington was told by a confidential source that a witness for the prosecution had threatened Sandstrom's life during an argument at a party several weeks before the murder. The source told Pennington that he had observed the argument from a distance, but that he had not heard any of the conversation. According to Pennington, the source had learned the content of the death-threat conversation from another guest who had overheard the incident.

Pennington was unable to confirm the rumor and did not broadcast a story. He did, however, disclose the rumor to both the Shawnee County prosecutor and to Mrs. Sandstrom's attorney. Mrs. Sandstrom later admitted killing her husband after he had filed for divorce. She pleaded innocent by reason of insanity.

Pennington was subpoenaed to testify as a defense witness and was asked to identify his source. He declined and the trial court found him in criminal contempt and sentenced him to 60 days in jail. He appealed.

In July 1978, the Kansas Supreme Court upheld the contempt order and jail term. The high state court said that the "proper test enunciated by the **Branzburg** majority is whether the information sought is relevant to the issues before the tribunal."

The Kansas court relied heavily on the definition of relevant information as proposed in **Brown v. Commonwealth**. The court said ". . . the scope of relevancy in a discovery proceeding is broader than the scope of relevancy at trial." Information which is not admissible at trial may lead to the discovery of admissible evidence. Thus, the court said, whether the information sought is inadmissible at trial is immaterial.

Although the court based its decision on a balancing test, it interpreted the test cautiously. The court never suggested how Pennington's information could help Mrs. Sandstrom's insanity defense. The prosecutor, who was defending the judge's order, admitted he did not understand the relevance of the information held by Pennington.[6]

In **Zelenka v. State** (266 N.W. 2d 279 (1978)), a balancing test was used to favor the reporter. Michael Fellner, a writer for the underground newspaper **Take-Over**, was called as a witness in Zelenka's murder trial. He refused to divulge sources for his article alleging that the Madison, Wis., Metropolitan Narcotics Squad was aware of impending drug charges against Zelenka. Defense attorneys maintained that Fellner's testimony could have led to an entrapment defense.

The Wisconsin Supreme Court said that **Branzburg** must be viewed with regard to the concurring opinion of Justice

Powell. Applying the balancing approach to Fellner's argument, the court said that the defendant could not demonstrate that he was denied a fair trial and that Fellner's information "was at best tangential to the case."

Although **Sandstrom** and **Zelenka** are important in understanding the development of a reporter's privilege, both were overshadowed by another 1978 case.

THE STORY OF MYRON FARBER

Myron Farber's story began in August 1975, when he was assigned to pursue a tip about the unexplained deaths of 13 patients 10 years earlier at a hospital in Oradell, N.J. On Jan. 7 and 8, 1976, the results of his four-month investigation were published in two page-one articles. The stories suggested that the deaths were a result of injections of a muscle relaxant, curare, administered by a staff doctor. The physician was identified as "Dr. X."

The articles prompted the Bergen County, N.J., prosecuting attorney, Joseph Woodcock, to reopen the investigation into the deaths. On May 19, a grand jury indicted Dr. Mario Jascalevich, charging him with the murder of five patients.

The Jascalevich trial began Feb. 27, 1978. The New York **Times** sent Farber to cover it. But Farber was barred from covering the case because he was listed as a defense witness. Prior to barring him, the Bergen County court offered to allow him to cover the trial provided that he agree to have his testimony taken in the judge's chambers before other witnesses testified. Farber declined.[7]

On Feb. 26, Farber was issued a subpoena. He testified in court on May 24 about his access to the state's records. He declined to answer questions about how he had obtained a copy of a previously missing deposition of Dr. Jascalevich. He claimed protection under New Jersey's shield law.

The defense counsel argued that the charges against Jascalevich had been fabricated by Farber and prosecutor Woodcock for "financial gain" and were part of a conspiracy "to advance their careers." The defense attorney based his claim on three facts: prosecutor Woodcock had given Farber permission to examine the state's files on the deaths; Farber had discovered, during his research, a copy of the missing 1966 Jascalevich deposition and had turned it over to the prosecutor; and Farber had signed a contract to write a book about the case.[8]

Farber denied any collusion with the prosecutor. He told the court that his files contained no information that would help prove the defendant's guilt or innocence. He said his files contained names of persons to whom he had promised confidentiality. He refused to let the court examine his notes. (New York **Times**, 28 November 1978).

The defense applied for a second subpoena against Farber and the **Times** that requested virtually everything Farber had compiled during his investigation. The trial court granted the subpoena, agreeing that Jascalevich's right to a fair trial would be denied if the information were not produced. The **Times** attorneys argued that the subpoenas should be quashed because:

- they were overbroad, especially in light of the First Amendment considerations;
- there had been no showing of materiality or necessity for the documents sought; and
- Farber's files were protected from compelled disclosure by the Constitution and the New York and New Jersey shield laws.[9]

The **Times** and Farber lost their motions to quash the subpoena at all judicial levels. Yet Farber and the **Times** refused to give up their files without a full hearing on their substantive challenges to the subpoena.

The Bergen County Superior Court judge issued an order directing Farber and the **Times** to demonstrate why they should not be held in criminal contempt. During the contempt hearing, the court ordered the defense to apply for an order to show cause for Farber's testimony "in aid of a litigant." A failure to comply would bring a civil contempt charge against both Farber and the **Times**.

The Bergen County Superior Court found Farber and the newspaper in contempt of court — both criminal and civil — on July 24, 1978. The **Times** was fined $100,000 and Farber was sentenced to six months in jail and fined $1,000 for the criminal convictions. The civil contempt convictions brought the newspaper additional fines of $5,000 a day and another $1,000 for Farber. The court ordered the reporter to jail until he complied with the civil order. The sentence for criminal contempt was not to begin until after Farber produced his files. Farber spent seven hours in jail that day, but was freed when the state Supreme Court granted a stay pending further review of the case.

The following day, the New Jersey Supreme Court voted 5-1 to deny the stay of the civil contempt conviction. The justices did permit a temporary stay to allow Farber and the **Times** the time necessary to appeal to the U.S. Supreme Court. The case went to Justice White, who declined to intervene.

The **Times** then took its appeal to Justice Marshall, who also refused to intervene. Marshall said that Farber and the newspaper had not met the criteria necessary for granting a stay because they had not demonstrated "a balance of hardships in their favor." Justice Marshall expressed reservations about the way in which the case had been handled in the New Jersey courts. He was particularly disturbed because Farber and the newspaper had been found guilty of civil and criminal contempt and had been sentenced without a hearing on the substantive issues surrounding the subpoena. Justice Marshall said the trial judge should have made a showing of materiality, relevance and necessity before issuing a certificate or before ordering in camera inspection.

Farber returned to jail Aug. 4. On Aug. 18, Farber turned over an incomplete and unedited copy of the manuscript of his book on the Jascalevich case in an effort to disprove allegations that he was profiting from the trial. Farber noted that the release of the manuscript was not a waiver of his right to protect his files. On the same day, the **Times** surrendered all of the newspaper's files. The files dealt only with contractual arrangements that previously had been disclosed.[10]

Finally, on Aug. 30, the New Jersey Supreme Court agreed to hear Farber's case. Farber was freed and fines were temporarily stayed for the duration of the case. The case was argued before the state Supreme Court on Sept. 5. On Sept. 21 the court voted 5-2 to uphold the civil and criminal contempt convictions for the newspaper and the report-

er.

Farber was ordered back to jail, but Justice Stewart granted a temporary stay while the U.S. Supreme Court decided on a petition for writ of certiorari. However the Jascalevich trial was winding down, and defense counsel asked the Supreme Court to end the stay. The defense hoped to force Farber to comply with the subpoena at the last minute. Before a decision was reached on whether to hear the case, the Supreme Court vacated the stay and Farber went back to jail.

The Jascalevich trial ended Oct. 23. The case went to the jury. The following day, the Bergen County Superior Court released Farber from his civil contempt sentence and suspended his six-month criminal contempt sentence (Washington **Post**, 25 October 1978). An hour after Farber's release, the jury found Jascalevich not guilty on all charges.

On Nov. 28, the U.S. Supreme Court again refused to review the New Jersey Supreme Court's decision. The contempt convictions were left intact. The case was over. The New York **Times** had paid more than $285,000 in fines. Myron Farber had spent 40 days in jail — the second longest imprisonment for a reporter claiming a testimonial privilege. But he had not disclosed his confidential files.[11]

POST-FARBER CASES

Shortly after the Farber case ended, **Pankratz v. District Court** came before the courts. On Dec. 13, 1978, Robert C. Ozer, the director of the Medicaid Fraud Unit of Colorado, allegedly disclosed to Pankratz, a Denver **Post** reporter, a list of expected indictments by a grand jury. The names were revealed before the grand jury had returned any indictments or had even deliberated about the indictments. The district court issued a contempt citation to Ozer for violating the secrecy requirements (**Pankratz v. District Court**, 609 P. 2d 1101 (1980)).

Pankratz was subpoenaed to testify and bring his notes to show cause why Ozer should not be held in contempt. The reporter moved to quash the subpoena. Although he admitted interviewing Ozer, he claimed a reporter's privilege not to testify.

In response to Pankratz' claim, the district court said that a reporter who has observed or participated in criminal or wrongful conduct and is subpoenaed to testify about such conduct "stands in the same shoes as any ordinary citizen and can claim no special privilege."

Pankratz appealed the decision to the state Supreme Court. The high court acknowledged that although the reporter was not the only person present during the release of the information, he was the only person present during the entire transaction. Relying heavily on **Branzburg**, the court said, "We do not agree that Pankratz had such a privilege under the circumstances of the case."

The court similarly ruled that Colorado's state constitution did not provide testimonial privilege for Pankratz in the course of a valid grand jury investigation or criminal trial.

In a concurring opinion, one justice said that he agreed with the decision but disagreed with the court's reasoning. He said the three-pronged test proposed by Justice Stewart in **Branzburg** should have been applied. The justice said the test would have produced a similar ruling requiring the reporter to disclose the information.

One of the most recent cases concerning a reporter's privilege is **New Hampshire v. Siel** (7 Med. L. Rptr. 1904 (1981)). The case involved two reporters for a student newspaper at the University of New Hampshire. They were subpoenaed to testify and bring information about a story on students involved in the murder of a "drifter." The district court quashed the subpoena after the reporters appealed. The defense applied to the state Superior Court for another subpoena.

The resolution of the case revolved primarily around the definition of "relevant" information. The court noted that the definition of relevancy was vague, arising from:

> the fact that the really difficult issue in all of the qualified privilege cases involves the concept of what it is that the relevant evidence must tend to prove if the need for it can properly be said to justify overruling the reporter's claim of privilege.

The court relied on **State v. St. Peter** to show that cases have dealt with the relevancy test by stating that the evidence must be "material." The court then employed Justice Stewart's three-pronged test to arrive at its decision:

> Over a reporter's objection based on constitutional grounds, in a criminal case to which the reporter is not a party, a court will not enforce a defendant's request that the reporter identify the source of published information unless the defendant has demonstrated a) that he has attempted unsuccessfully to obtain the information by all reasonable alternatives to questioning the confidential souce; b) that the information sought from or through the source would be relevant to his defense, and; c) that there is a reasonable possibility that such information as evidence could affect the verdict in the case.

CREATIVE STRATEGIES FOR PROTECTING SOURCES

The **Pankratz** and **Siel** cases are just two examples of the blizzard of subpoenas issued to reporters after the Farber case. From May 1978 to February 1979 alone, "more than 40 subpoenas in criminal cases were issued against reporters."[12] Between 1960 and 1968, there were approximately one dozen subpoenas served on the press, according to the Reporters' Committee for Freedom of the Press. During the next two years, about 150 subpoenas were issued to reporters. From 1970 to 1976, about 500 subpoenas were served. After that, subpoenas became so numerous that the Reporters' Committee stopped counting.[13]

The rapid growth is alarming. Some observers claim that serving subpoenas on reporters has become a legal maneuver:

> Lawyers use them in some cases, for example, to delay a trial or to gather information without having to do the legwork. But more alarming, perhaps,

is their use by defense lawyers as groundwork for an appeal. If a defendant is convicted after a reporter has refused to relinquish notes, the lawyer can argue that the person was denied a fair trial because the necessary materials were not available.[14]

As a result of the overuse and abuse of subpoenas, members of the press have devised strategies to combat — or work around — the legal system.

Christopher Little, counsel to the Washington **Post**, has offered several suggestions for fighting subpoenas:

- if it's known that your general rule is to fight every subpoena, then often the subpoena never gets issued;
- don't be swayed into complying in certain cases because a "worthy plaintiff" might lose without the requested information;
- the subpoena must be served, but there is no obligation to tell where a reporter is. Lawyers are likely to be discouraged easily if they cannot serve a subpoena immediately, especially if the information is peripheral to the case.[15]

Floyd Abrams, attorney for Farber and the New York **Times**, admits to counseling reporters on strategic methods to safeguard information. Abrams, however, says that "none of (the methods) was secure, except destruction." He also has suggested delivering confidential information to the news organization's in-house counsel, so the material arguably would be protected by the confidentiality of the attorney-client privilege.

The **Record-Eagle** in Traverse City, Mich., has its sensitive notes taken to "safer, off-premises locales" for storage. A newspaper in California has a similar system: "Notes, papers, recordings of a sensitive nature are now hidden off-premises in order to protect them. Initial notes are retyped (sources, names and phone numbers are deleted, and originals are destroyed)."[17]

Bruce Locklin, a reporter for the **Record** of Bergen County, N.J., said that he has his sources sign affidavits before he interviews them. The affidavits say that the source's name will not be used in the article, but if the article is involved in litigation, the name may be disclosed. Other journalists, such as Robert Greene of **Newsday**, say that they seek a source's approval to disclose identities if the reporter finds himself or herself "at the jailhouse door." Greene also says he takes the names of confidential sources out of information to be stored in files or computers and replaces them with codes, which he has committed to memory.[18]

A reporter for the Honolulu **Advertiser**, Walter Wright, said that changes have been made in reporting techniques because of the "changing legal atmosphere."

> . . . we are less likely to offer confidentiality to sources than in the past, and the sorts of stories we are able to publish changes as a result. We are doing more institutional investigations, relying on open sources and public records, and fewer criminal investigations in the area of public corruptions, organized crime and white-collar crime.[19]

Reporters have also reported increased use of safety-deposit boxes for storage of records and tapes. A few reporters have taken to using sources and not asking the persons for names.[20]

HOW PRIVILEGED IS THE PRESS?

Two trends have been followed in this report. The first is the concept of a developing qualified privilege for reporters based on the First Amendment. The second involves the increasing number of subpoenas seeking confidential information.

It may seem unusual for the two trends to be developing concurrently. Common sense might lead to the conclusion that as a reporter's privilege becomes more widely accepted, the number of subpoenas would decrease. That is not the case.

As society becomes more complex, the press must be better informed to understand and interpret information. That demands more research, more education, greater evaluation and an emphasis on investigative reporting rather than the mere recording of facts. In an information-rich society the press holds more information that someone is likely to want. One way to get the information is through a subpoena.

Money is another reason the two trends are developing together. Most newspapers do not have the financial resources of the New York **Times** or the Washington **Post**. Pursuing a case through litigation is often expensive. To avoid the cost of an appeal, the press may give in to a subpoena.

A third reason for the concurrent trends lies in the court system itself. An examination of the cases dealing with a reporter's claim to privilege reveals that no clear-cut rule is being followed. **Branzburg** seems to provide few answers and many questions; it has been cited by the lower courts to both recognize and deny a qualified privilege.

The press probably will never enjoy an absolute privilege to withhold information. As long as the press is required to testify in some situations, subpoenas will be issued against journalists. As long as there is the threat of subpoenas, reporters will rely on strategies to avoid disclosing their secrets.

The future of a reporter's privilege is uncertain. Most courts today acknowledge a qualified privilege, but in the absence of a definitive ruling by the Supreme Court, the privilege is shaky at best. Perhaps the time is right for another Supreme Court ruling on the subject. If and when that happens, the high court will have a large reserve of cases on which to rely to clarify the confusing question of how much protection the First Amendment offers journalists.

FOOTNOTES

1. American Law Reports, 7 A.L.R. 3d 591 (1966). There are at least 11 cases prior to 1958 in which state and federal appellate courts were called upon to decide whether journalists had a common law privilege not to disclose information or sources. In all 11 cases, the courts refused to recognize such a privilege. **Garland v. Torre**, 259 F. 2d 545 (1958); **Brewster v. Boston Herald-Traveler Corp.**, 20 F.R.D. 41 (1957); **People v. Durrant**, 48 P. 75 (1897); **Ex parte Lawrence**, 48 P. 124 (1897); **Joslyn v. People**, 184 P. 375 (1919); **Clein v. State**, 52 So. 2d 117 (1950); **Plunkett v. Hamilton**, 70 S.E. 781 (1911); **Pledger v. State**, 3 S.E. 320 (1887); **In re Wayne**, 4 Hawaii Dist. F. 475 (1914); **In re Grunow**, 85 A. 1011 (1913); **People ex rel. Mooney v. Sheriff of New York**

County, 199 N.E. 415 (1936); **People ex rel. Phelps v. Fancher**, 2 Hun. 226 (9 Sup. Ct. Reports, N.Y. 1874).
2. Marla Cohen, "Shield Legislation in the United States," **Freedom of Information Center Report No. 212** (November 1968), p. 1.
3. Joan Harcourt Cody, "Reporter's Privilege: **Pankratz v. District Court**," **58 Denver Law Journal** at 683, Summer 1981.
4. **Ibid.** at 686.
5. David Gordon, "Newsman's Privilege and the Law," (Columbia, Missouri: Freedom of Information Foundation, 1974), pp. 15-17.
6. "Confidentiality — Criminal," **News Media and the Law**, 3 (May/June 1979), p. 8.
7. "Subpoenaed Reporter Barred from Covering Murder Trial," 3 Med. L. Rptr. No. 24, 14 March 1978.
8. Stephen R. Hofer, "The Fallacy of Farber: Failure to Acknowledge the Constitutional Newsman's Privilege in Criminal Cases," **Journal of Criminal Law** 70: 299-336, Fall 1979.
9. **Ibid.** at 324.
10. "News Notes," 5 Med. L. Rptr., 29 August 1978.
11. Hofer, "The Fallacy of Farber," p. 327.
12. Alan Bromley, "Exploring Some Strategies for Protecting Sources from Inquisitive Attorneys," **The IRE Journal**, Spring 1981, p. 7.
13. "Subpoenas for Reporters' Notes Rising: Lawyers Increase Use as Trial Tactic," **FOI Digest** 20 (November-December 1978), p. 1.
14. **Ibid.**
15. "Some Brief Comments on Subpoenas to Reporters," FOI File, State/Subpoena, April 1979.
16. Bromley, "Exploring Some Strategies," p. 8.
17. **Ibid.**
18. **Ibid.**
19. **Ibid.**
20. **Ibid.**

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